

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Case No. 07-80138-CR-MARRA/VITUNAC(S)

UNITED STATES OF AMERICA,

Plaintiff,

-versus -

FRANK SARCONA

aka Frank Sarcone,  
aka Dave Johnson,

Defendant.

**UNITED STATES' MOTION TO AUTHORIZE ALTERNATIVE  
PROCEDURES PURSUANT TO 18 U.S.C. § 3771(d)(2)  
AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW the UNITED STATES OF AMERICA, by and through the undersigned Assistant United States Attorney, and moves this Court, unopposed by the defendant, for an order fashioning a reasonable procedure to give effect to the Justice for All Act of 2004 ("The Act") pursuant to 18 U.S.C. §3771(d)(2) which does not unduly complicate or prolong the proceedings, and states as follows:

The Act provides certain rights for victims in federal criminal proceedings. The rights afforded to crime victims are as follows:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be

materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a).

Prosecutors are required to make their best efforts to ensure that crime victims are notified of and accorded their rights, including the right to seek the advice of an attorney with respect to the rights afforded by § 3771(a). 18 U.S.C. § 3771(c)(1),(2).

The Act defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a federal offense. . . ." 18 U.S.C. § 3771(e). However, the Act recognizes that in cases involving "multiple crime victims," a court has the discretion to adopt procedures that will not unduly interfere with the criminal proceedings. Specifically, the Act provides:

(2) Multiple Crime Victims.--In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

18 U.S.C. § 3771(d)(2).

The government submits that this pending criminal case fits within the "multiple crime victims" provision. The "direct and proximate" victims of the charged offenses may exceed 100,000 persons, throughout the United States, who purchased Lipoban and related products in

the period between early 2000 and October 2004. Based upon the number of purchasers, the time frame the purchases were made, the likelihood of address changes, the expenses associated with large and multiple mailings, as well as attendant delays, then under these circumstances it is impracticable for the government to provide each victim with reasonable, accurate, and timely notice in advance of all of the relevant proceedings as required under The Act.

However, rather than seek a complete waiver of the notice provision of The Act, the government proposes that the court authorize it to provide notice of the proceedings required by §3771(a)(2) via publication and web site. Notice by publication and web site are reasonable procedures that will give effect to The Act and will not unduly complicate or prolong the public court proceedings. Consequently, the government seeks authorization to fully satisfy its notification obligation to victims by the publication of notices/advertisements in the following south Florida newspapers and via the creation of a web page: the Miami Herald, the Sun Sentinel and the Palm Beach Post. In selecting these publications we observed that Lipoban had addresses virtually exclusively in Palm Beach and Broward Counties. Additionally, based upon Lipoban records, and as charged in the indictment, we have learned that Lipoban advertised in the Sun Sentinel and local weekend paper supplements. The Herald is included to give a wider base to the notice. These notices/advertisements are to run for two days in each paper (once per week). Since the victims were primarily women, it is intended that at least one of the days the ad is to be in a diet, women or home related type section of the paper.

The notices/advertisements will discuss the case, the indictment, principals involved, and will identify the creation of a victim's web page to assist victims in pursuing their rights under

the Act.<sup>1</sup> The site is expected to be:

<http://www.usdoj.gov/usao/fls/VictimWitness/LipoBanClinic.html>. The website is anticipated to contain links to essential documents such as the indictment, the Court's scheduling orders, and other important court filings. Moreover, if this application is approved, the United States will issue a press release discussing the creation of the victims web page, thereby providing a wider base for the public.<sup>2</sup>

Although in the view of the undersigned the defendant has no standing in this application, in an abundance of caution the United States has consulted with counsel for the defendant who has advised that the defendant has no objection to the relief requested.

#### **CONCLUSION**

The government submits that (1) it is impracticable to give every potential victim individual notice of every court proceeding; and (2) the combination of local newspaper notices/advertisements, press release and web site is a "reasonable procedure" under Section 3771(d)(2) for providing notice to victims of the offenses.

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<sup>1</sup> The United States Attorney's Office has previously used web pages to notify victims in large fraud cases and can be viewed at <http://www.usdoj.gov/usao/fls/VictimWitness.html>.

<sup>2</sup> A press release has previously been issued and can be located on the web at various locations.

The United States therefore asks that the Court find that individualized notice is impracticable and that the proposed notice procedure satisfies the Act. A proposed order has been forwarded to the Court via separate e-mail.

Respectfully submitted,

R. ALEXANDER ACOSTA  
UNITED STATES ATTORNEY

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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 3, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF to counsel of record. :

s/KERRY S. BARON  
KERRY S. BARON  
ASSISTANT UNITED STATES ATTORNEY